

On appeal respondent asks the Appeals Board to review findings related to the nature and extent of claimant's disability. Respondent also notes that as originally entered, the Award failed to properly award liability against the Kansas Workers Compensation Fund pursuant to stipulations of the parties. Although a subsequent nunc pro tunc order did apportion liability pursuant to the stipulations, respondent still asks that the Appeals Board specifically incorporate the stipulation as the award against the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds claimant is entitled to benefits based upon a thirty-six percent (36%) permanent partial general disability.

Respondent contends claimant is not entitled to work disability and should be limited to an award based on functional impairment because the evidence establishes claimant could have returned to her previous employment with respondent at a comparable wage. Respondent bases the argument primarily on the testimony of Dr. Hudson, a physician who treated claimant for a period of time after she left her employment with the respondent. For the reasons stated below, the evidence persuades the Appeals Board that claimant probably and most likely could not return to the comparable wage employment.

Claimant worked for the respondent, Ozark Salad, from May of 1986 until August 1992. She began developing pain in her feet after working for respondent approximately one year. She underwent surgery to both feet in 1987 and to her right foot in 1990. A third surgery was performed on her left foot by Dr. Caudell in September 1991. Dr. Caudell released her to return to work in February 1992. After approximately two weeks of attempting to perform her duties she was placed on medical leave. Medical leave lasted until July 31, 1992 and at that time claimant was terminated.

Claimant has alleged that she suffered a series of injuries through her last day of employment with the respondent. Claimant's counsel referred the claimant to Dr. Schlachter for evaluation. He reviewed Dr. Caudell's records and examined claimant. From his examination he found scars on her left foot from surgery on the metatarsal bones. He noted that she walked with a slight limp because of the pain and was unable to bear full pressure on her feet. He diagnosed calluses on both feet secondary to prolonged standing and aggravation of the congenital abnormalities in the bones of her feet. He expressed his opinion that she had a five percent (5%) permanent partial impairment of function of each foot which equates to four percent (4%) of the lower extremity or two percent (2%) to the body as a whole. These ratings combined yield a rating of four percent (4%) of the body as a whole. He recommended as restrictions limiting her to standing no more than six hours in an eight (8) hour day and standing no more than an hour without the opportunity to sit down. He suggested she avoid walking more than one (1) mile per an eight (8) hour day and that she not carry more than twenty-five (25) pounds when she walks.

Respondent referred claimant to Dr. Hudson, a podiatrist, in January of 1993. He recommended an abrasive bar, a cream and an orthotic device. Dr. Hudson saw claimant again in February, March and April of 1993. In his opinion she reached maximum medical recovery on April 19, 1993. Dr. Hudson concluded that she did not have a disability that

would prevent her from gainful employment and that she should be able to return to a regular eight (8) hour day job with regular breaks and no other restrictions.

The Appeals Board finds claimant is unable to return to comparable wage employment with the respondent for three reasons. First, claimant a long-time employee, has testified convincingly that she attempted to return to those job duties but doing so made her condition worse. Second, Dr. Schlachter recommends restrictions which would make her unable to perform those duties. Finally, the Appeals Board notes that claimant's condition has been a recurring one which medical treatment, to date, has been unable to prevent or cure. She underwent surgery in 1987, 1989 and again in 1991. Each time she was off work for several months. From the combined weight of this evidence the Appeals Board concludes that claimant's congenital problems were aggravated by standing on her feet in the course of her employment resulting in a disabling medical disability which makes her unable to continue in her employment with the respondent.

Two experts testified regarding the effect of the disability on claimant's ability to earn a comparable wage and obtain employment in the open labor market. Mr. Jerry Hardin testified on behalf of the claimant that, in his opinion, based upon Dr. Schlachter's restrictions as explained in his deposition, claimant has lost fifty-five to sixty percent (55-60%) of her ability to engage in work in the open labor market. He gave his opinion that claimant had lost thirty-six percent (36%) of her ability to earn a comparable wage based upon his understanding that her pre-injury wage was \$314. By stipulation, once the fringe benefits were terminated in August of 1992, her wage was \$494.96. Comparing the stipulated wage to the projected post-injury wage of \$200.00 per week shows a sixty percent (60%) loss of ability to earn a comparable wage.

Ms. Karen Terrill testified that based upon the restrictions of Dr. Schlachter as clarified in his deposition, claimant suffered a twenty-five percent (25%) loss of ability to work in the open labor market. She concluded claimant could earn a wage comparable to that she was earning at Ozark Salad, the respondent. Although Ms. Terrill used the \$314 per week base wage in stating this conclusion, the Appeals Board also understands her opinion to be one that indicates that she could earn a comparable wage and accordingly has a zero percent (0%) loss of ability to earn a comparable wage.

For the reasons stated above, the Appeals Board finds the opinions and restrictions expressed by Dr. Schlachter to be more convincing. The Appeals Board also considers it appropriate to adjust the wage loss factor expressed by Mr. Hardin to one based on the stipulated average weekly wage of \$494.96. The Appeals Board then gives equal weight to the two prongs of the work disability test, i.e., loss of ability to earn a comparable wage and loss of ability to obtain employment in the open labor market. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Doing so yields a thirty-six percent (36%) partial general impairment in which the Appeals Board finds accurately represents the disability suffered in this case.

(2) The Appeals Board adopts the stipulations of the parties including those relating to Kansas Workers Compensation Fund liability and finds that the Kansas Workers Compensation Fund will be responsible for sixty-six and two-thirds (66.67%) of all compensation, including medical, temporary total, permanent partial general disability and costs awarded in this case. The respondent will be responsible for the remaining thirty-three and one third percent (33.33%) of all amounts awarded in this case, including costs.

(3) The Appeals Board notes an obvious error in the award as it relates to the temporary total disability benefits awarded. The Award states claimant was temporarily totally disabled for the period of February 11, 1992 through May 12, 1993 and then calculates this to be a 13.14 weeks. Neither party has, however, raised this issue on appeal and the Appeals Board will not, therefore, address the issue.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey should be and hereby is modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debbie J. Killion, and against the respondent, Ozark Salad Company, and the insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred on February 11, 1992, for 13.14 weeks of temporary total disability compensation at the rate of \$269.51 per week based on an average weekly wage of \$404.25, in the sum of \$3541.36 and 11.57 weeks of compensation at the rate of \$97.02 per week in the sum of \$1,122.52 and, based on an average weekly wage of \$494.96, 390.29 weeks of compensation at the rate of \$118.80 per week in the sum of \$46,366.45 for 36% permanent partial general body work disability making a total award of \$51,030.33.

As of March 17, 1995, there is due and owing claimant 13.14 weeks in temporary total compensation in the sum of \$3,541.36, 11.57 weeks of permanent partial compensation at the rate of \$97.02 per week in the sum of \$1,122.52 and 136.72 weeks of permanent partial compensation at the rate of \$118.80 per week in the sum of \$16,242.34 making a total due and owing of \$20,906.22.

The remaining 253.57 weeks are to be paid at the rate of \$118.80 week until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed one-third to the respondent and two-thirds to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	\$150.00
Special Administrative Law Judge	
Martin D. Delmont	
Transcript of Preliminary Hearing (9-24-92)	\$206.35
Transcript of Preliminary Hearing (7-1-93)	\$ 91.25
Transcript of Regular Hearing	\$ 74.70
Deposition of Debbie J. Killion	\$277.90

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Deposition of Richard P. Hudson, DPM	\$209.80
Barber & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$191.00
Todd Reporting	
Deposition of Jerry D. Hardin	\$323.05
Ireland Court Reporting	
Deposition of Karen Crist Terrill	\$233.08

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

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c: Chris A. Clements, Wichita, KS
Leigh C. Hudson, Fort Scott, KS
Timothy D. Clover, Chanute, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director